

The relief described hereinbelow is **SO ORDERED**.

SIGNED this 20th day of November, 2020.




Robert D. Berger
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

**MICHELLE L. GIBLER and
ROBERT M. GIBLER II,**

Debtors.

Case No. 18-22573
Chapter 13

**MICHELLE L. GIBLER and,
ROBERT M. GIBLER II,**

Plaintiffs,

Adv. No. 19-6017

v.

**AUDREY BERNIECE GARBER and
DOUG GARBER CONSTRUCTION, INC.,**

Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Plaintiffs' motion for summary judgment on Counts I, III, and IV of their adversary complaint. For the reasons that follow, Plaintiffs' motion will be denied, and Counts III and IV will be dismissed for lack of subject-matter jurisdiction.

Plaintiff/debtor Robert Gibler and his brother Jeffrey ("Robert" and "Jeff") inherited four parcels of real property in Lawrence, Kansas, as cotenants in 2013. Two of the parcels are vacant lots (the "Vacant Lots"), one is located at 541 Perry Street ("541 Perry"), and one is not at issue in this case. On January 31, 2015, Robert and Jeff entered into a contract for deed with defendant Garber Construction as to 541 Perry (the "Contract"). On February 7, 2015, Robert and Jeff signed warranty deeds conveying the Vacant Lots to defendant Berniece Garber ("Berniece"). Count I of Plaintiffs' complaint alleges that Garber Construction breached the Contract; Counts III and IV allege that the conveyance of the Vacant Lots to Berniece is avoidable as a fraudulent transfer under 11 U.S.C. § 544.¹

Counts III and IV of Plaintiffs' complaint rely on the argument that Plaintiffs, as Chapter 13 debtors, may exercise the strong-arm avoidance powers of the Chapter 13 trustee. However, that argument was rejected in 2005 by the Bankruptcy Appellate Panel of the Tenth Circuit. *See Hansen v. Green Tree*

¹ Generally speaking, § 544(b)(1) permits the trustee to avoid a transfer of the debtor's interest in property where that transfer is "voidable under applicable law by a creditor holding an unsecured claim." Count III of Plaintiffs' complaint alleges that the transfer of the Vacant Lots is voidable by the IRS under 26 U.S.C. § 6901(a)(1)(A); Count IV alleges that the transfer is voidable by Plaintiffs' creditors generally under K.S.A. § 33-207(a)(1).

Servicing, LLC (In re Hansen), [332 B.R. 8](#) (B.A.P. 10th Cir. 2005). A majority of the courts to consider the issue have likewise refused to allow Chapter 13 debtors to exercise the trustee’s avoidance powers. *See 5 Collier on Bankruptcy* ¶ 544.07[3] (Richard Levin & Henry J. Sommer, eds., 16th ed.). With reservations,² this Court follows the majority view and the B.A.P.; Plaintiffs’ motion for summary judgment will be denied as to Counts III and IV of their complaint. Moreover, since Plaintiffs lack standing to assert the Chapter 13 trustee’s avoidance powers, Counts III and IV must be dismissed for lack of subject-matter jurisdiction. *See Hansen*, [332 B.R. at 16](#).

As to Count I, which alleges that Garber Construction breached the Contract, the undisputed facts are these:

1. On March 5, 2013, the United States filed a Notice of Federal Tax Lien against Robert and Michelle Gibler, arising out of unpaid income taxes from 2006, 2008, and 2011, for \$17,401.17.
2. Robert, Jeff, and Garber Construction executed the Contract for 541 Perry on January 31, 2015, with Robert and Jeff as “Seller” and Garber Construction as “Purchaser.”

² *Compare* 1 David G. Epstein, Steve H. Nickles, & James J. White, *Bankruptcy* § 6-2 n.20 (1992) (cataloguing cases holding that Chapter 13 debtor may exercise trustee’s avoidance powers), *with* 7 William L. Norton III, *Bankr. L. & Prac.* § 145:7 (3d ed. 2020) (“A growing number of reported decisions restrict the Chapter 13 debtor’s use of the avoidance and recovery powers to the recovery of exempt property under Code § 522.”).

3. The Contract provides for a purchase price of \$30,500 plus 4% annual interest, with the balance due on January 31, 2018.
4. On September 30, 2015, the United States filed a second Notice of Federal Tax Lien against Robert and Michelle Gibler, arising out of unpaid income taxes from 2013, for \$3,268.98.
5. Section 10 of the Contract provides: "Upon total payment of the purchase price and any and all late charges, and other amounts due Seller, Seller agrees to deliver to Purchaser a Warranty Deed to the subject property, at Seller's expense, free and clear of any liens of encumbrances other than taxes and assessments for the current year."
6. The federal tax liens were on 541 Perry as of January 31, 2018.
7. Garber Construction did not pay the balance of the purchase price on January 31, 2018.
8. Plaintiffs filed for bankruptcy on December 18, 2018.
9. On January 31, 2019, the Internal Revenue Service filed a proof of claim in Plaintiffs' bankruptcy for \$61,659.94, including a claim for \$30,280.44 secured by the federal tax liens.
10. Plaintiffs' Chapter 13 plan proposes to pay the IRS as a secured claim.
11. The federal tax liens are still on 541 Perry.
12. Garber Construction still has not paid the balance of the purchase price for 541 Perry under the Contract.

To establish a breach of contract claim under Kansas law, a plaintiff must demonstrate (among other things) “the plaintiff’s performance or willingness to perform in compliance with the contract.” *See Stechschulte v. Jennings*, [297 Kan. 2, 23](#) (2013). Here, Plaintiffs argue that Robert is willing to perform in compliance with the Contract because [26 U.S.C. § 6325\(b\)\(2\)](#) is a procedural vehicle through which the federal tax liens might be removed from the title to 541 Perry. However, because the title to 541 Perry is currently encumbered, Robert is not in a position to perform. *See Russell v. Ferrell*, [181 Kan. 259, 270](#) (1957) (holding that seller was not in a position to perform where title was encumbered by a mortgage). Because Robert is not in a position to perform, Garber Construction is under no obligation to pay the balance of the purchase price under the Contract. *See id.* (holding that buyer was not obligated to perform where title was encumbered). Since Garber Construction is under no obligation to pay the balance of the purchase price due under the Contract, its failure to do so is not a breach of the Contract. Therefore, Plaintiffs’ motion for summary judgment will be denied as to Count I of their complaint.

For the reasons stated above, Plaintiffs’ motion for summary judgment is hereby denied, and Counts III and IV of Plaintiffs’ complaint are hereby dismissed pursuant to [Fed. R. Civ. P. 12\(b\)\(1\)](#)³ for lack of subject-matter jurisdiction.

IT IS SO ORDERED.

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³ Rule 12(b)(1) applies to this adversary proceeding via [Fed. R. Bankr. P. 7012\(b\)](#).